

# National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies

November 2022 Update

Country: Malta

FRANET contractor: The People for Change Foundation

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# 1. Summary

FRANET contractors are requested to highlight in 1 page **maximum** the key developments in the area of surveillance by intelligence services in their Member State. This introductory summary should enable the reader to have a snapshot of the evolution during the reporting period (mid-2016 until third quarter of 2022). It should mention:

*the most significant legislative reform/s that took place or are taking place and highlight the key aspect/s of the reform, focusing on oversight and remedies.  
relevant oversight bodies' (expert bodies (including non-judicial bodies, where relevant), data protection authorities, parliamentary commissions) reports/statements about the national legal framework in the area of surveillance by intelligence services.*

## List of the different relevant reports produced in the context of FRA's surveillance project to be taken into account

### FRA 2017 Report:

[Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU - Volume II: field perspectives and legal update](#)

### FRANET data collection for the FRA 2017 Report:

[Country studies for the project on National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies - Legal update](#)

[Country studies for the project on National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies - Monthly data collection on the current reform of intelligence legislation \(BE, FI, FR, DE, NL and SE\)](#)

### FRA 2015 Report:

[Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – mapping Member States' legal framework](#)

### FRANET data collection for the FRA 2015 Report:

[Country studies for the project on National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies](#)

## Legislative reforms

**In Malta**, there have been no major developments to the surveillance legal framework between mid-2016 and the third quarter of 2022. The Security Service Act has not changed significantly since its adoption in 1996.<sup>1</sup> The only recent amendment, introduced by Act XXI of 2020, concerns Article 5(e) of the Security Service Act. The amendment transfers the power to appoint members of the Security Service from the responsible Minister to the head of the Service.<sup>2</sup>

Relevant to the surveillance framework is also legislation regarding data protection. There have been no amendments to the Processing of Personal Data (Electronic Communications Sector) Regulations since 2013.<sup>3</sup> In 2018, the Maltese Parliament repealed the Data Protection Act (Chapter 440) and

<sup>1</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Chapter 391 - Security Service Act](#), 26 July 1996.

<sup>2</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Act XXI of 2020 – Devolution of Certain Ministerial Powers Act](#), Art. 2, 23 April 2020.

<sup>3</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Subsidiary Legislation 586.01 - Processing of Personal Data \(Electronic Communications Sector\) Regulations](#), 15 July 2003.

replaced it with Chapter 586.<sup>4</sup> The new Data Protection Act implements and further specifies the provisions of the General Data Protection Regulation (GDPR) and focuses on “the protection of natural persons with regard to the processing of personal data and on the free movement of such data.”<sup>5</sup> Article 11 institutes the Data Protection Commissioner as the national Data Protection Authority.”<sup>6</sup> However, the Act does not apply to the processing of personal data “for the purpose of the safeguarding against and the prevention of threats to public security.”<sup>7</sup> Therefore, the Office of the Information and Data Protection Commissioner (IDPC) does not have the competence to supervise the data processing activities of the Maltese Security Service, nor has any power to take action against the Security Service.<sup>8</sup>

### **Oversight bodies reports and statements**

In Malta, the bodies overseeing the intelligence service are the Commissioner of the Security Service and the Security Committee. The Commissioner is either a judge of the superior courts or an officer of the Attorney General. The Commissioner is appointed by and reports to the Prime Minister and has the power to investigate complaints about the Security Service.<sup>9</sup> Pursuant to the Security Service Act, “any person may complain to the Commissioner if he is aggrieved by anything which he believes the Security Service has done in relation to him or to any property of his.”<sup>10</sup> “The persons who may complain to the Commissioner include any organisation and any association or combination of persons.”<sup>11</sup>

The Security Committee is composed of the Prime Minister, the Minister responsible for the Security Service, the Minister for Foreign Affairs, and the Leader of the Opposition. It examines the expenditure, administration, and policy of the Security Service.<sup>12</sup>

The Security Committee is also required to write an annual report on the discharge of its functions. The reports submitted between 2016 and 2019 outline the priorities and operations of the Security Service without mentioning any significant changes in the legal framework.<sup>13</sup> On the contrary, the 2020 Report states that between late 2019 and early 2020 the Security Service set in motion a strategic review process. The initiative encompasses an analysis of the laws governing the service and introduces suggestions for new legislation. The report does not mention what is the content of these

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<sup>4</sup> Malta, Maltese Legislation (Legislazzjoni Malta) (2018) [Chapter 586 - Data Protection Act](#), 28 May 2018.

<sup>5</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Chapter 586 - Data Protection Act](#), Art. 2, 28 May 2018.

<sup>6</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Chapter 586 - Data Protection Act](#), Art. 11, 28 May 2018.

<sup>7</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Chapter 586 - Data Protection Act](#), Art. 4 (d), 28 May 2018.

<sup>8</sup> Information request by email, Malta, Office of the Information and Data Protection Commissioner (IDPC), 7 November 2022.

<sup>9</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Chapter 391 - Security Service Act](#), Arts. 12-13, 26 July 1996.

<sup>10</sup> Malta, Maltese Legislation (Legislazzjoni Malta) Chapter 391 - Security Service Act, Schedule 1 (1), 26 July 1996.

<sup>11</sup> Malta, Maltese Legislation (Legislazzjoni Malta) Chapter 391 - Security Service Act, Schedule 1 (10), 26 July 1996.

<sup>12</sup> Malta, Maltese Legislation (Legislazzjoni Malta) [Chapter 391 - Security Service Act](#), Art. 14, 26 July 1996.

<sup>13</sup> Malta, Parliament of Malta, [Paper Laid No. 1152 - Security Committee Annual Report 2016](#), 6 February 2018; [Paper Laid No. 4184 - Security Committee Annual Report 2018](#), 19 November 2019;

[Paper Laid No. 7530 - Security Committee Annual Report 2019](#), 17 January 2022.

proposals nor which stage they have reached.<sup>14</sup> The Security Committee has not yet laid the 2021 report before the Parliament.<sup>15</sup>

There have been no reports by parliamentary committees regarding surveillance between mid-2016 and October 2022.<sup>16</sup> In 2018 and 2019, the Office of the Information and Data Protection Commissioner (IDPC) published its annual Activity Reports, which do not mention any relevant developments.<sup>17</sup>

The UN Special Rapporteur on the Right to Privacy highlighted the need for legislative reform, specifically regarding oversight and remedies. On 12 December 2019, Special Rapporteur Joe Cannataci submitted a communication to the Maltese Government, stating that “*existing safeguards need to be significantly improved in order to conform to Malta’s obligations under human rights law*”. The Special Rapporteur advanced detailed proposals about the overhaul of the Security Service Act, including the creation of an independent Security Commissioner and of a Security Service Oversight Board.<sup>18</sup>

Similar concerns emerge from the Group of States against Corruption (GRECO), the Council of Europe anti-corruption body. On 3 April 2019, GRECO published its fifth-round evaluation report on Malta, which stresses that the Security Service Act allows for broad discretion of the executive. The report states that “Malta needs to provide for a proper system of checks and balance, as well as a balance between the needs of an effective fight against corruption (and other forms of serious crime) and the preservation of fundamental rights.”<sup>19</sup>

## 2. Annexes- Table and Figures

### 2.1. Overview of security and intelligence services in the EU-27

*FRANET contractors are requested to check the accuracy of the table below (see Annex pp. 93 - 95 of the FRA 2015 report) and correct or add in track changes any missing information concerning security and intelligence services in their Member State (incl. translation and abbreviation in the original language). Please provide the full reference in a footnote to the relevant national law substantiating all the corrections and/or additions made in the table.*

Inaccuracy: the previous version did not mention the name of the Security Service in Maltese.

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<sup>14</sup> Malta, Parliament of Malta, [Paper Laid No. 7531 - Security Committee Annual Report 2020](#), p. 10, 17 January 2022.

<sup>15</sup> Malta, Parliament of Malta, [Papers Laid](#), accessed on 26 October 2022.

<sup>16</sup> Malta, [Parliament of Malta](#), accessed on 26 October 2022.

<sup>17</sup> Malta, Office of the Information and Data Protection Commissioner (IDPC), [Annual Report 2019](#), April 2021; [Annual Report 2018](#), August 2020.

<sup>18</sup> United Nations, Office of the High Commissioner for Human Rights (OHCHR), [Malta: UN expert recommends broad changes to surveillance laws](#), 18 December 2019.

<sup>19</sup> Council of Europe, Group of States Against Corruption (GRECO), [Fifth Evaluation Round Evaluation Report Malta](#), p. 33, 3 April 2019.

	Civil (internal)	Civil (external)	Civil (internal and external)	Military
MT			Security Service/Servizz tas - Sigurta <sup>20</sup>	

## 2.2. EU Member States' legal framework on surveillance reformed since 2017

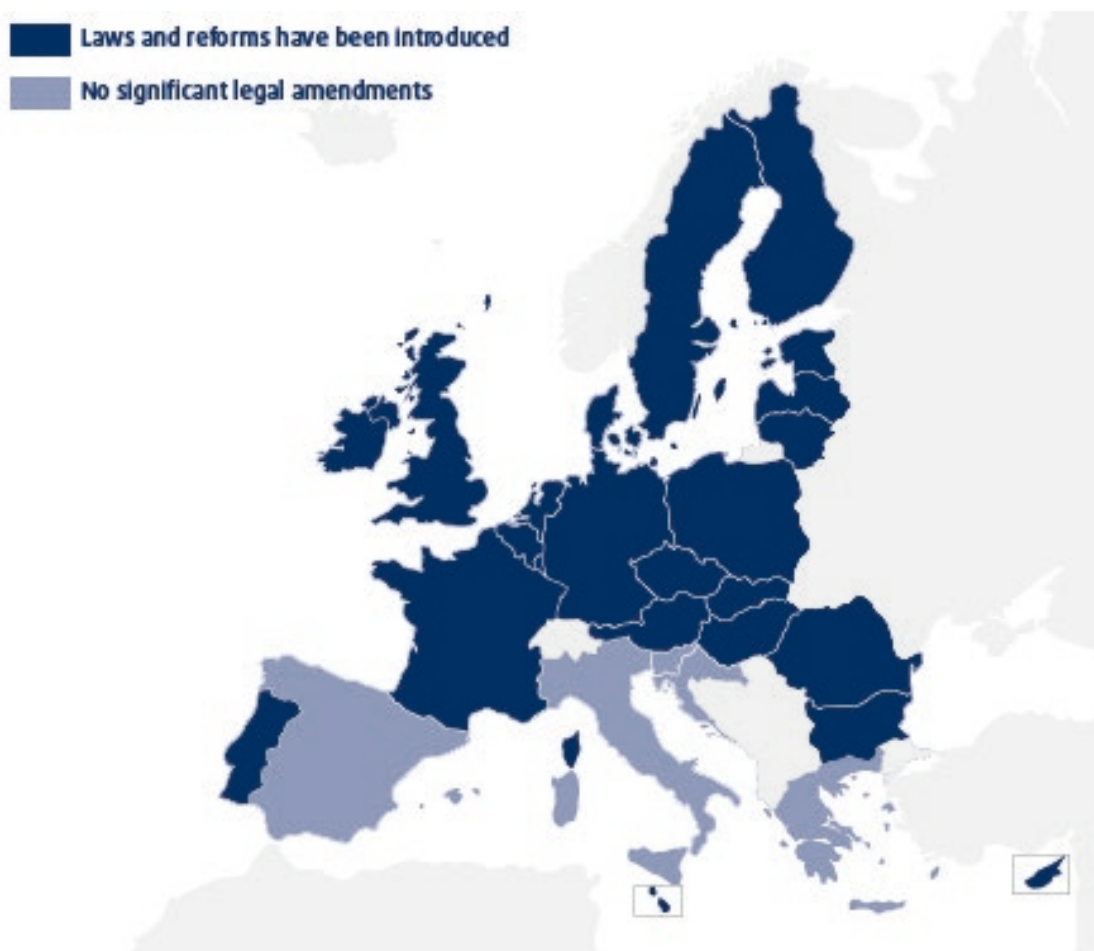
*In order to update the map below (Figure 1 (p. 20) of the FRA 2017 report), FRANET contractors are requested to state:*

- 1. Whether their legal framework on surveillance has been reformed or is in the process of being reformed since **mid-2017** – see the Index of the FRA 2017 report, pp. 148 - 151. Please do not to describe this new legislation but only provide a full reference.*
- 2. whether the reform was initiated in the context of the PEGASUS revelations.*

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<sup>20</sup> The Crime and Security branch has a specific [National Crime and Security Intelligence Service](#) which is in turn divided into two subsections focusing on terrorism and organised crime respectively. For an overview of Ireland's National Security policies, see Mulqueen, M. (2008), 'A Weak Link? Irish National Security Policy on International Terrorism', *Contemporary Security Policy*, Vol. 28, No. 2, pp. 331–332.

**Figure 1: EU Member States' legal frameworks on surveillance reformed since October 2015**



There have been no significant reforms of the Security Service Act, nor is the act in the process of being reformed.<sup>21</sup> The only recent change, introduced by Act XXI of 2020, concerns Article 5(e) of the Security Service Act. The amendment transfers the power to appoint members of the Security Service from the responsible Minister to the head of the Service.<sup>22</sup>

In 2018, the Maltese Parliament repealed the Data Protection Act (Chapter 440) and replaced it with Chapter 586, which implements and further specifies the provisions of the General Data Protection Regulation (GDPR).<sup>23</sup> However, the Act does not apply to the processing of personal data “*for the purpose of the safeguarding against and the prevention of threats to public security.*”<sup>24</sup> Oversight and remedy mechanisms in relation to surveillance have therefore not been reformed. Malta should be colour coded under the category of ‘no significant legal amendments’ in Figure 1.

<sup>21</sup> Malta, Maltese Legislation (Leġislazzjoni Malta) [Chapter 391 - Security Service Act](#), 26 July 1996.

<sup>22</sup> Malta, Maltese Legislation (Leġislazzjoni Malta) [Act XXI of 2020 – Devolution of Certain Ministerial Powers Act](#), Art. 2, 23 April 2020.

<sup>23</sup> Malta, Maltese Legislation (Leġislazzjoni Malta) (2018) [Chapter 586 - Data Protection Act](#), 28 May 2018.

<sup>24</sup> Malta, Maltese Legislation (Leġislazzjoni Malta) [Chapter 586 - Data Protection Act](#), Art. 4 (d), 28 May 2018.

### 2.3. Intelligence services' accountability scheme

*FRANET contractors are requested to confirm whether the diagram below (Figure 5 (p. 65) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

Inaccuracy: in Malta, there is no parliamentary nor judicial oversight of the Security Service.<sup>25</sup> The operations of the Security Service are overseen by the responsible Minister (executive control), the Commissioner of the Security Service (an expert body) and the Security Committee (formed by members of the executive).

Only the responsible Minister can issue or modify warrants authorising entry on or interference with property and interception of or interference with communications.<sup>26</sup>

The Commissioner of the Security Service is appointed by the Prime Minister and must have held the office of Attorney General or judge of the superior courts to be eligible for the position.<sup>27</sup> The Commissioner has the authority to keep under review the exercise of the Minister's powers regarding the issuance of warrants.<sup>28</sup> Moreover, the Commissioner can investigate individual complaints about the Security Service.<sup>29</sup> The decisions of the Commissioner shall not be subject to appeal nor liable to be questioned in any court.<sup>30</sup> The Commissioner must make an annual report on the discharge of their functions to the Prime Minister, who will subsequently put the report before the Security Committee.<sup>31</sup>

The Security Committee is composed of the Prime Minister, the Minister responsible for the Security Service, the Minister for Foreign Affairs, and the Leader of the Opposition. It examines the expenditure, administration, and policy of the Security Service.<sup>32</sup>

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<sup>25</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) Chapter 391 - Security Service Act, 26 July 1996.

<sup>26</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) Chapter 391 - Security Service Act, Arts. 6-10, 26 July 1996.

<sup>27</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) Chapter 391 - Security Service Act, Art. 12 (1), 26 July 1996.

<sup>28</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) Chapter 391 - Security Service Act, Art. 12 (3)(a), 26 July 1996.

<sup>29</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) Chapter 391 - Security Service Act, Art. 13 (1) and Schedule 1, 26 July 1996.

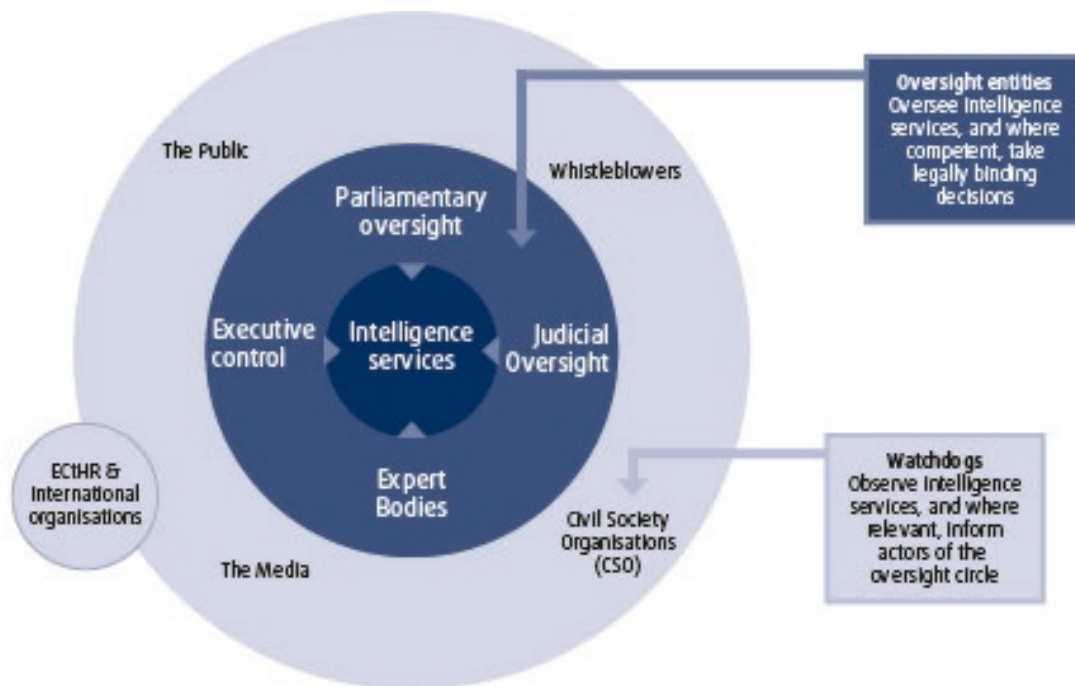
<sup>30</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) Chapter 391 - Security Service Act, Art. 13 (2), 26 July 1996.

<sup>31</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) [Chapter 391 - Security Service Act](#), Art. 12 (6),(7), 26 July 1996.

<sup>32</sup> Malta, Maltese Legislation (Legiżlazzjoni Malta) [Chapter 391 - Security Service Act](#), Art. 14, 26 July 1996.



**Figure 5: Intelligence services' accountability scheme**

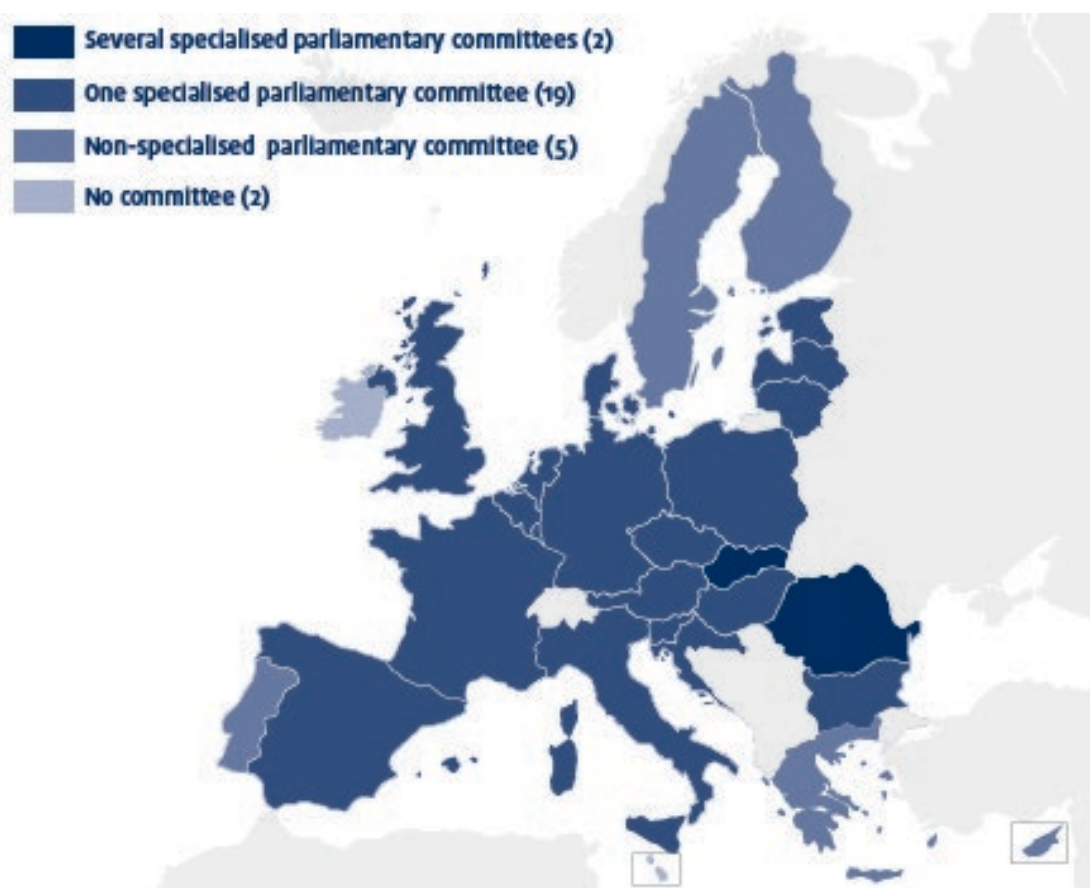


## 2.4. Parliamentary oversight of intelligence services in EU Member States

*FRANET contractors are requested to confirm that the map below (Figure 6 (p. 66) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

No developments: there is no parliamentary committee overseeing the intelligence services.

**Figure 6: Parliamentary oversight of intelligence services in EU Member States**



## 2.5. Expert bodies (excluding DPAs) overseeing intelligence services in the EU

*FRANET contractors are requested to check the accuracy of the table below (Table 2 (p. 68) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

Inaccuracy: we added the Security Committee, which examines the expenditure, administration and policy of the Security Service.<sup>33</sup>

**Table 2: Expert bodies (excluding DPAs) overseeing intelligence services in the EU**

EU Member State	Expert Bodies
MT	Commissioner of the Security Service ( <i>Kummissarju tas-Servizz ta' Sigurtà</i> ) Security Committee ( <i>Kumitat ta' Sigurtà</i> ) <sup>34</sup>

## 2.6 DPAs' powers over national intelligence services, by member states

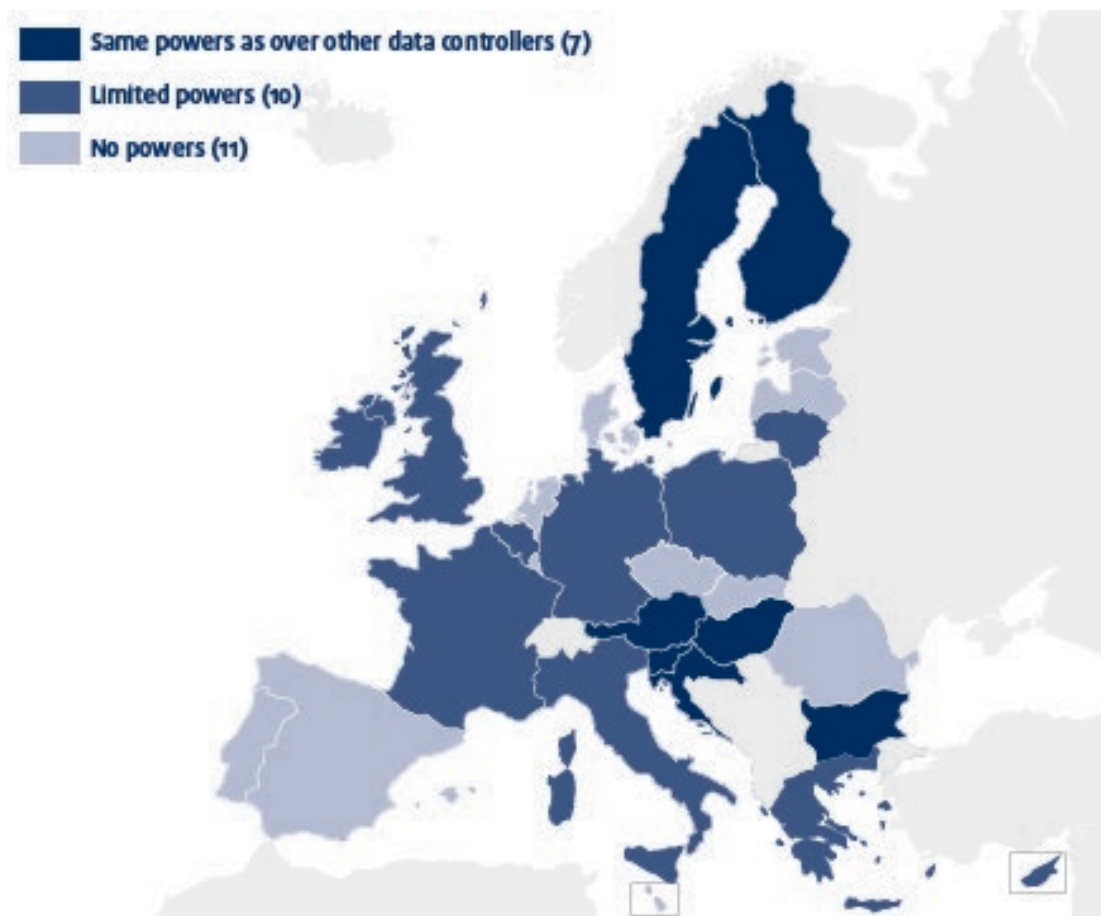
*FRANET contractors are requested to confirm that the map below (Figure 7 (p. 81) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

<sup>33</sup> Malta, Maltese Legislation (Leġislazzjoni Malta) Chapter 391 - Security Service Act, art. 14, 26 July 1996.

<sup>34</sup> Malta, Maltese Legislation (Leġislazzjoni Malta) Chapter 391 - Security Service Act, art. 14, 26 July 1996.

No developments: the DPA does not have power over the national intelligence service.<sup>35</sup>

**Figure 7: DPAs' powers over national intelligence services, by member states**



## 2.7. DPAs' and expert bodies' powers over intelligence techniques, by EU Member State

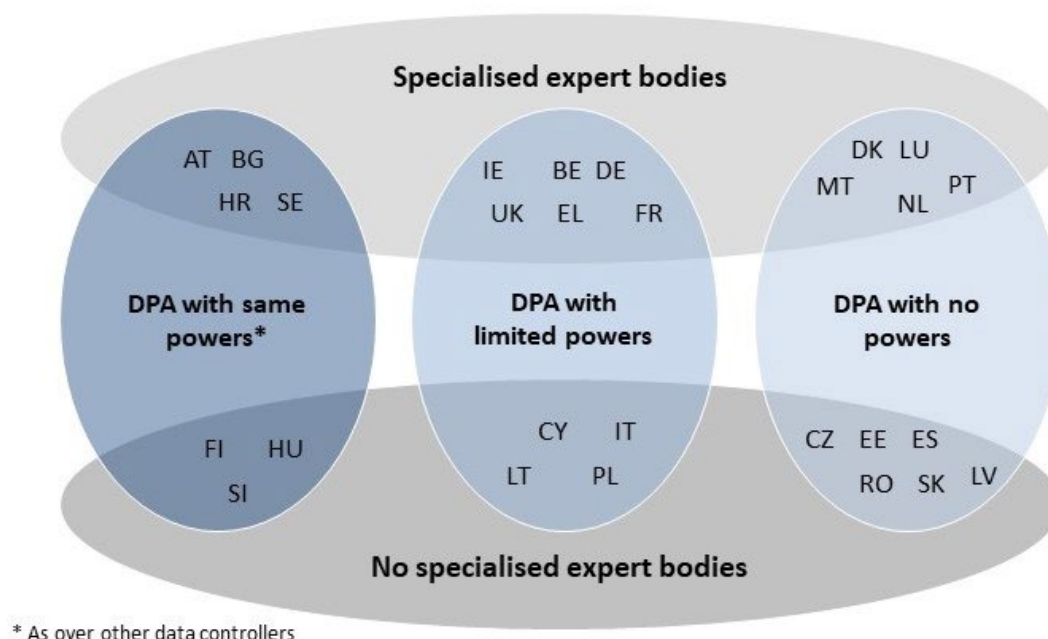
*FRANET contractors are required to check the accuracy of the figure below (Figure 8 (p. 82) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

No developments: the DPA does not have powers over intelligence techniques.<sup>36</sup>In figure 8, Malta should remain in the same categories, namely “DPA with no powers” and “Specialised expert bodies.”

<sup>35</sup> Information request by email, Malta, Office of the Information and Data Protection Commissioner (IDPC), 7 November 2022.

<sup>36</sup> Information request by email, Malta, Office of the Information and Data Protection Commissioner (IDPC), 7 November 2022.

**Figure 8: DPAs' and expert bodies' powers over intelligence techniques, by EU Member State**



## 2.8. Binding authorisation/approval of targeted surveillance measures in the EU

FRANET contractors are required to check the accuracy of table below (Table 4 (p. 95) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

**Table 4: Binding authorisation/approval of targeted surveillance measures in the EU-27**

	Judicial	Executive	Expert bodies	Services
MT		✓		

No developments: targeted surveillance measures are authorised by the executive.

## 2.9. Approval/authorisation of general surveillance of communication

All FRANET contractors are requested to check the accuracy of the table below (Table 5 (p. 97) of the FRA 2017 report), and to update/include information as it applies to their Member State (if not previously referred to). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework, in particular where - since 2017 - your Member State regulates these type of surveillance methods (for a definition of general surveillance, see FRA 2017 Report, p. 19).

**Table 5: Approval/authorisation of general surveillance of communication in France, Germany, the Netherlands and Sweden**

	Judicial	Parliamentary	Executive	Expert
DE		✓		✓
FR			✓	
NL	✓		✓	✓
SE				✓

No developments: the Security Service Act mainly regards targeted interception of communications as opposed to general surveillance.

## 2.10. Non-judicial bodies with remedial powers

*FRANET contractors are requested to check the accuracy of table below (Table 6 (p. 112) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

**Table 6: Non-judicial bodies with remedial powers in the context of surveillance, by EU Member State**

	Executive (ministry)	Expert body(ies)	DPA	Parliamentary committee(s)	Ombuds institution
MT		✓	✓		

Inaccuracy: The DPA does not have remedial powers in the context of surveillance.<sup>37</sup>

Under the Security Service Act, the Commissioner is responsible for investigating complaints submitted by a person or entity who believes the Security Service has violated their rights or property.<sup>38</sup> Upon granting the complaint, the Commissioner has the discretion to act as per the following remedies:

- order to cease any activities by the Security Service related to the complainant and destroy any records of the information improperly obtained.
- Quash any warrant or authorisation improperly issued, renewed, given or modified.
- Recommend to the Prime Minister that the complainant receive compensation.<sup>39</sup>

## 2.11. Implementing effective remedies

*FRANET contractors are requested to confirm that the diagram below (Figure 9 (p. 114) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

No changes

<sup>37</sup> Information request by email, Malta, Office of the Information and Data Protection Commissioner (IDPC), 7 November 2022

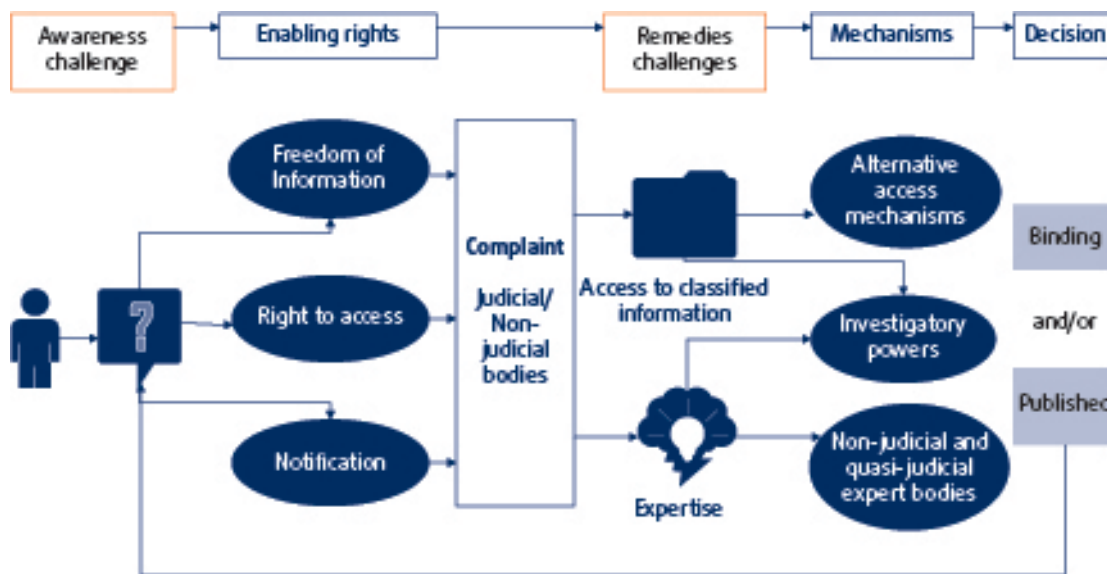
<sup>38</sup> Malta, Maltese Legislation (Legizlazzjoni Malta) Chapter 391 - Security Service Act, Schedule 1 (1), 26 July 1996.

<sup>39</sup> Malta, Maltese Legislation (Legizlazzjoni Malta) Chapter 391 - Security Service Act, Schedule 1 (6), 26 July 1996.

The Security Service Act specifies that the Commissioner should have access to any document or information necessary to perform their duties, which include the investigation of complaints. The following persons must provide such information to the Commissioner: any member of the Security Service; any public officer; any person engaged in the business of providing postal, radiocommunications or telecommunications services; any person who, in terms of the Official Secrets Act, is either a government contractor or a member or employee of a prescribed body or a body of a prescribed class, a holder of a prescribed office or an employee of such a holder.<sup>40</sup>

There is no specific mention of classified information in Maltese law. However, article 12(4) of the Security Service Act allows the Commissioner to access any information necessary to carry out its duties. It is a general provision, but in the absence of *lex specialis*, I assume it can imply that the Commissioner also has the power to access classified information.

**Figure 9: Implementing effective remedies: challenges and solutions**



## 2.12. Non-judicial bodies' remedial powers

*FRANET contractors are required to check the accuracy of table below (Table 7 (pp. 115 - 116) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

No developments.

<sup>40</sup> Malta, Maltese Legislation (Legizlazzjoni Malta) Chapter 391 - Security Service Act, art. 12 (4), 26 July 1996.



**2. Table 7: Non-judicial bodies' remedial powers in case of surveillance, by EU Member State**

	Bodies with remedial competence	Decisions are binding	May fully access collected data	Control is communicated to complainant	Decision may be reviewed
MT	Commissioner of the Security Service				

Note:

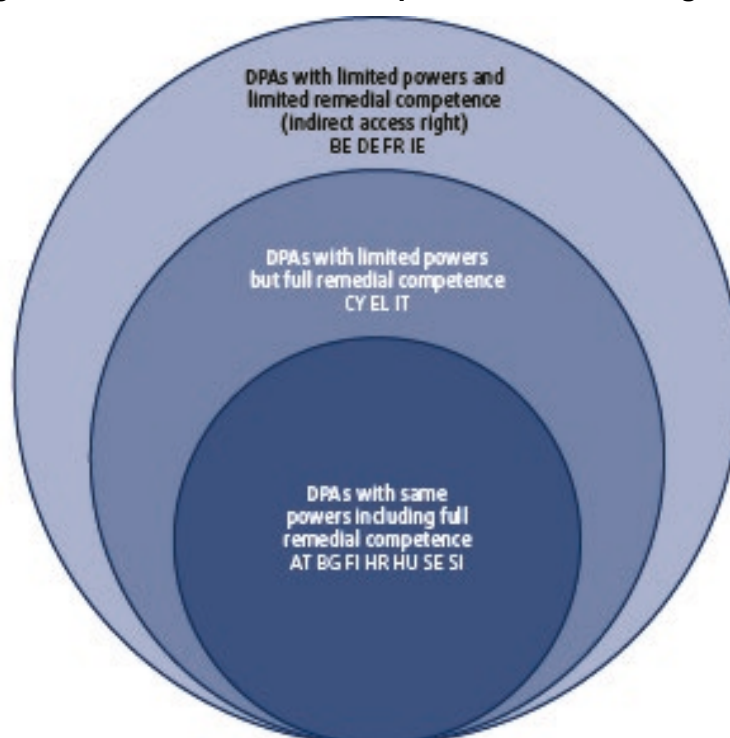
- = Expert body
- = Ombuds institution
- = Data protection authority
- = Parliamentary Committee
- = Executive

Source: FRA, 2017

### 2.13. DPAs' remedial competences

*FRANET contractors are required to check the accuracy of the figure below (Figure 10 (p. 117) of the FRA 2017 report) with respect to the situation in your Member State. In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.*

**Figure 10: DPAs' remedial competences over intelligence services**



No developments: the DPA has no powers and no remedial competences over intelligence services.<sup>41</sup>

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<sup>41</sup> Information request by email, Malta, Office of the Information and Data Protection Commissioner (IDPC), 7 November 2022.